Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

EDGEWATER SUN SPOT, INC., EDGAR L. MATHIEU and JANE E. MATHIEU,

Petitioners,

vs.

PENNINGTON & HABEN, P.A.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Chapter 11 of the Bankruptcy Code, can an attorney who represents a debtor-in-possession be deemed to be "disinterested" or "lack an interest adverse to the estate" where such attorney conceals his relationship with an adverse party, and then engages in conduct that results in the appearance that he has abandoned the representation of his client against said adverse party?

LIST OF PARTIES

Charles Glidewell, Assistant United States Trustee

Edgewater Sun Spot, Inc., has no parent companies or nonwholly-owned subsidiaries.

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Petitioner, Edgewater Sun Spot, Inc., Edgar L. Mathieu and Jane E. Mathieu, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is not published. The opinion of the district court that was affirmed by the court of appeals is published at 183 B.R. 938. The bankruptcy court's opinion is published at 174 B.R. 626.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on April 24, 1996. The jurisdiction of this Court is invoked under 28 U.S.C § 1254.

STATUTES INVOLVED

The pertinent provisions of the Bankruptcy Code, Title 11 United States Code, are set forth below:

> **§ 101(14). Definition — "disinterested person"**
>
> (14) "disinterested person" means person that —
>
> * * *
>
> (E) does not have an interest materially adverse to the interest of the estate or of any class of creditors or equity security holders, by reason of any

direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason;

§ 327(a). Employment of professional persons

Except as otherwise provided in this section, the trustee, with the court's approval, may employ one or more attorneys, accounts, appraisers, auctioneers, or other professional person, that do not hold or represent an interest adverse to the estate, and that are disinterested person, to represent or assist the trustee in carrying out the trustee's duties under this title.

§ 328(c) Limitation on compensation of professional persons

Except as provided in section 327(c), 327(e), or 1107(b) of this title the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1103 of this title if, at any time during such professional person's employment under section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

§ 330(a) Compensation of officers

(1) After notice to the parties in interest and the United Sates Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103 —

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any paraprofessional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The Court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

STATEMENT OF THE CASE

The petitioners (hereinafter referred to as "debtors") filed their respective voluntary Chapter 11 petitions on August 9, 1991. Pursuant to applications filed by the debtors, the bankruptcy court entered an order for joint administration on August 27, 1991. The respondents (hereinafter referred to as "PH" or the "applicant firm") were originally retained in order to

advise and assist the debtors in regard to their dispute with one of their secured creditors, Bay Bank & Trust Co. ("Bay Bank"). Their initial contact with PH was with one of its partners, Ben Wilkinson, and it was Mr. Wilkinson that involved an associate attorney, Mark Hildreth. Based upon advice received from PH, the debtors stopped making payments to Bay Bank and eventually filed Chapter 11. After the Chapter 11 case was filed, the employment of PH, and Mr. Hildreth in particular, was approved on August 14, 1991. PH initially was approved to serve as general Chapter 11 counsel for the debtors.

A short time after the filing of the Chapter 11 and approval of PH's employment, Mark Hildreth announced that he would be leaving the firm. The debtors were then introduced to D. Andrew Byrne, another PH associate, who they were advised would work on the Chapter 11 case under Mr. Wilkinson's supervision. In papers filed to seek approval of Mr. Byrne's employment, it was represented that Mr. Byrne was a disinterested, experienced bankruptcy attorney. After Mr. Byrne's employment was approved, the debtors developed a belief that Mr. Byrne was either not qualified to represent them or lacked the necessary Chapter 11 experience (the debtors contend that Mr. Byrne himself made this admission), and they asked Mr. Hildreth to become once again actively involved in the case. Mr. Hildreth's re-engagement was approved by an order entered December 10, 1991.

After Mr. Hildreth returned to the case, he assumed responsibility for certain specific Chapter 11 issues. PH was to assist Mr. Hildreth as needed, but PH's primary responsibility was thereafter to prosecute the debtors' lender liability claims against Bay Bank. The debtors continued to believe that all PH activities were being supervised by Mr. Wilkinson. PH attempted to obtain discovery to support the debtors' claims by use of Bankruptcy Rule 2004 examinations, and some discovery

was obtained from Bay Bank's primary loan officer, William Welliver. However, Bay Bank complained about this procedure, and on November 18, 1991, the bankruptcy court entered a protective order that provided as a practical matter that all future discovery from Bay Bank would have to be obtained pursuant to an adversary proceeding. On April 1, 1992, PH filed the complaint that initiated the adversary proceeding against Bay Bank, which proceeding was filed by PH in the bankruptcy court.

The adversary proceeding and the Chapter 11 case both proceeded, and there were intermittent negotiations between the debtors and Bay Bank, all of which were handled by Mr. Hildreth. In the adversary proceeding, the parties filed cross-motions for summary judgment, and these motions came on to be heard on June 16, 1993. The bankruptcy court took these motions under advisement.

At the suggestion of Mr. Byrne, the debtors and Bay Bank agreed at the June 16, 1993 hearing that the adversary proceeding would be referred to mediation. Between the hearing and the mediation, which occurred on November 12, 1993, negotiations continued between the debtors and Bay Bank, with Mr. Hildreth carrying on the negotiations on behalf of the debtors. It was Mr. Hildreth's impression that a deal had been struck as to confirmation of a Chapter 11 plan and that the mediation would be limited to possible settlement of the adversary proceeding. Once the debtors reached the mediation, however, they were presented with an ultimatum type offer from Bay Bank that required settlement of the adversary proceeding along with approval of the plan. Two non-party witnesses testified that Mr. Byrne threatened to quit if his clients did not accept the bank's offer and that when Mr. Mathieu remained steadfast in his refusal, Mr. Byrne did indeed announce that he was quitting. It is clear that Mr. Mathieu believed that he was being pressured by Mr. Byrne to accept a settlement with Bay Bank that Mr. Mathieu could not accept in good conscience.

After the mediation, there was no further contact between Mr. Mathieu and Mr. Byrne until Mr. Byrne delivered the second fee application to Mr. Mathieu. In the interim, Mr. Hildreth negotiated some additional but minor concessions from Bay Bank, and the debtors' third amended plan was confirmed by an order entered January 7, 1994. Following the mediation, Mr. Mathieu engaged the services of a private investigator and discovered for the first time that there was a family relationship between Andrew Byrne and a bank that had a substantial relationship with Bay Bank. While representing the debtors, Mr. Byrne also became a member of an Advisory Council of the United States Small Business Administration, on which the President of Bay Bank also served. The SBA had issued a guaranty with respect to the debtors' loan with Bay Bank and was indirectly involved in the settlement negotiations. Moreover, the debtors had requested that Mr. Byrne obtain discovery from SBA for use in their case with Bay Bank, which Mr. Byrne refused to do. Mr. Byrne contends that he disclosed his SBA involvement to Mr. Mathieu, but Mr. Mathieu disputes this contention, and in any event, PH admits that there was no disclosure to the bankruptcy court of either Mr. Byrne's family relationship to First National Bank of Grady County or his involvement with the SBA's advisory council.

The applicant law firm, served their second application for an award of attorneys' fees and expenses on February 4, 1994. The debtors served their objection to the application on April 19, 1994. The application and objection were set to be heard on June 30, 1994. On the day of the hearing regarding the application and objection, the applicant firm served an amendment to its application. After receiving evidence from both parties, the bankruptcy judge took the matter under advisement and directed the parties to submit memoranda. On October 12, 1994, the bankruptcy court issued its order which overruled the debtors' objections and awarded fees and expenses

to the applicant firm. The debtors thereupon filed their appeal to the district court. The district court entered a written opinion that affirmed the bankruptcy court in all respects. The debtors next appealed to the Court of Appeals for the Eleventh Circuit, and a panel of the Court of Appeals affirmed *per curiam*.

REASONS FOR GRANTING THE WRIT

I.

PROVISIONS OF THE BANKRUPTCY CODE WHICH LIMIT THE EMPLOYMENT AND COMPENSATION OF AN ATTORNEY WHO IS NOT A DISINTERESTED PERSON OR WHO HOLDS AN INTEREST ADVERSE TO THE ESTATE SHOULD BE INTERPRETED BY THIS COURT TO PROVIDE GUIDANCE TO LOWER COURTS WHO ENCOUNTER SITUATIONS, SUCH AS THAT PRESENTED HERE, WHEREIN THE ATTORNEY DOES NOT HAVE A CLASSIC CONFLICT OF INTEREST BUT DOES HAVE QUESTIONABLE ASSOCIATIONS THAT ARE COUPLED WITH CONDUCT DURING THE REPRESENTATION WHICH GIVES RISE TO THE BELIEF THAT SUCH ASSOCIATIONS HAVE AFFECTED NEGATIVELY HIS LOYALTY AND THE QUALITY OF HIS REPRESENTATION.

This Court should grant the writ in order to provide guidance to the lower federal courts on an important point having to do with the role of attorneys whose employment is approved to represent a bankruptcy trustee or debtor in possession and their compensation. The concept of disinterestedness arises from the phrase "disinterested person" that is used in both 11 U.S.C. § 327(a) and 11 U.S.C. § 328(c), which collectively provide limitations on the employment and compensation of attorneys

who represent bankruptcy trustees and debtors in possession. The above-mentioned sections also limit employment and compensation of attorneys who "hold or represent an interest adverse to the estate."

The phrase "disinterested person" is defined in 11 U.S.C. § 101(14). However, subsection 101(14)(E) is problematic inasmuch as it contains undefined, yet essential terms such as "an interest" and "materially adverse," followed by a listing of reasons that ends with the catch-all phrase "or for any other reason." Unlike subsections (A)-(D) of Section 101(14), which are fairly clear and straightforward, the terminology used in subsection (E) of Section 101(14) leaves great latitude for interpretation and has spawned most of the litigation in the area of attorney employment and compensation.

No definition is provided in Title 11 to which reference can be made to determine whether or not the attorney holds an interest adverse to the estate. The Court of Appeals for the Eleventh Circuit has, in another case, attempted to define the phrase "hold . . . an interest adverse," as follows:

> holding or representing an interest adverse to the estate as possessing, or serving as an attorney for a person possessing, either an "economic interest that would tend to lessen the value of the bankruptcy estate or that would create either an actual or potential dispute in which the estate is a rival claimant . . . or . . . a predisposition under the circumstances that render such a bias against the estate."

In re Prince, 40 F.3d 356, 361 (11th Cir. 1994) citing *Roger J.*

Au & Son, Inc. v. Aetna Ins. Co., 64 B.R. 600, 604 (N.D. Ohio 1986).

Neither party to this appeal was able to locate and cite to the court of appeals any case decided by this Court that would provide guidance for dealing with the concepts contained in Sections 327(a) and 328(c). The amount of litigation spawned by these sections is the first indication of a need for a decision from this Court that will provide such guidance. In addition, the participants in bankruptcy cases, including debtors, bankruptcy trustees, the United States Trustee, their attorneys, and even the bankruptcy court are faced with the uncertainty created by these sections and the legion of varying decisional authority which attempts to interpret them. The opinions of the District Court and the Bankruptcy Court in this case are typically included in course materials for and discussions at various seminars on bankruptcy law.

The present case represents a particularly good opportunity to deal with the questions of disinterested person and holding an adverse interest inasmuch as both problems are present in a situation that the petitioners readily concede falls within a "gray area." The attorneys here involved do not have a classic conflict of interest, nor do they have a direct economic interest that is adverse to the debtor. Rather, they have or have entered into associations which cause their clients to believe that the attorneys were biased against them and their cause, resulting in abandonment of the representation and outrageous conduct that precipitated a less than favorable result. Moreover, it is likely that viewing each such association, as did the lower courts, isolated from the other and from the attorney's conduct, would result in a finding favorable to the attorneys, but the petitioners have contended throughout, that the totality of the situation must be considered in determining whether disqualification under Section 327(a) or a reduction of compensation under Section 328(c) is warranted.

The district court's opinion, affirmed by the court of appeals panel, addressed the petitioners' contentions as to disinterestedness and the holding of an adverse interest separately. The district court made findings based on the record that, in effect, led to a conclusion that Andrew Byrne's participation of the SBA's advisory council was not representation of an adverse party. The district court did not address, or even mention, the appearance that the participation of Mr. Byrne on an advisory council of a contingent creditor (SBA) would lead his client and other participants in the case to believe that his association with an SBA created entity would adversely affect his ability to aggressively prosecute his client's cause, particularly when that association was not disclosed to the bankruptcy court. The district court next addressed Mr. Byrne's family ties to a bank that had a substantial relationship with Bay Bank. Again, notwithstanding evidence in the record that Mr. Byrne had bragged to his client about his having special expertise arising from "his" family connections in banking and unrefuted evidence that there was friendship between the principals of the banks and an otherwise unusually close association, the district court chose to focus its analysis on the lack of evidence of Mr. Byrne's direct involvement with the bank and his lack of direct knowledge of the relationship between the banks. The district court placed no duty on Mr. Byrne or his firm to make any inquiry of Mr. Byrne's wife or father-in-law regarding their bank's associations with adverse parties. However, it is clear that when this association came to light it presented an appearance that Mr. Byrne's self-proclaimed family ties in banking were of a sort that would give him a predisposition against his clients' cause. What the district court entirely failed to do was to consider these facts cumulatively and then compare them with Mr. Byrne's conduct in and around the mediation. What is clear is that the petitioners were shocked and dismayed when their advocate turned on them at the mediation and attempted to coerce them to accept a settlement. They then

looked for reasons that would explain Mr. Byrne's conduct. Lo and behold, they found an association with SBA, the guarantor of their Bay Bank loan, and that the family banking ties Mr. Byrne so proudly proclaimed tied back to Bay Bank. These associations were to the petitioners, as average citizens, convincing and dispositive as to Mr. Byrne's true loyalties and offered the only explanation for his conduct. While sophisticated and academic legal analysis, such as that of the district court here, is somewhat warranted on this issue, what the district court ignored is the cumulative effect of Mr. Byrne's associations and his conduct and the appearance they would give, not only to his clients but also others who might view these facts more objectively. If there is a less than insubstantial doubt as to Mr. Byrne's loyalties, particularly given the lack of disclosure, then his firm should be found not to be in compliance with the requirements of Section 327(a). The bankruptcy court should then deal separately with the amount of any reduction of compensation that is warranted under Section 328(c). It is, however, neither just nor correct, as a matter of policy and preservation of the integrity of the federal bankruptcy system, to merely view a situation such as the one presented by the present case as an academic exercise that does not take into account Mr. Byrne's outrageous conduct and the manner in which his above-discussed associations could be used by a rational person to explain such conduct. This would seem to be at the very heart of the public interests that Sections 327(a) and 328(c) are designed to serve.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED APRIL 24, 1996

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 95-2920
Non-Argument Calendar

D.C. Docket Nos. 94-CV-50370/RV
91-02304, 91-02303

IN RE: EDGEWATER SUN SPOT, INC., EDGAR L. MATHIEU and JANE E. MATHIEU,

Debtors.

EDGEWATER SUN SPOT, INC., EDGAR L. MATHIEU and JANE E. MATHIEU,

Plaintiffs-Appellants,

versus

PENNINGTON & HABEN, P.A.,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Florida

(April 24, 1996)

Appendix A

Before TJOFLAT, Chief Judge, ANDERSON and BIRCH, Circuit Judges.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

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1. 11th Cir. R. 36-1 provides:

> When the court determines that any of the following circumstances exist:
>
> (a) the judgment of the district court is based on findings of fact that are not clearly erroneous;
>
> (b) the evidence in support of a jury verdict is sufficient;
>
> (c) the order of an administrative agency is supported by substantial evidence on the record as a whole;
>
> (d) a summary judgment, directed verdict, or judgment on the pleadings is supported by the record;
>
> (e) the judgment has been entered without a reversible error of law;
>
> and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, PANAMA DIVISION FILED JUNE 23, 1995

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

CASE NO. 94-5037-RV

IN RE: EDGEWATER SUN SPOT, INC., and EDGAR L. and JANE E. MATHIEU,

Debtors,

EDGEWATER SUN SPOT, INC., EDGAR L. MATHIEU, and JANE E. MATHIEU,

Appellants,

v.

PENNINGTON & HABEN, P.A.,

Appellee.

ORDER

Debtors, Edgewater Sun Spot, Inc., Edgar L. Mathieu, and Jane E. Mathieu, have appealed from a decision of the Bankruptcy Unit of this Court in their jointly administered bankruptcy cases [*In re Edgar L. and Jane E. Mathieu*, Case Number 91-02303 and *In re Edgewater Sun Spot, Inc.*, Case Number 91-02304]. Appellants contend that the Bankruptcy

Judge erred in awarding attorney's fees and costs to appellee Pennington & Haben, P.A. Appellants also contend that the Bankruptcy Judge erred in denying their motion for partial abstention, and in his evidentiary rulings during the hearing on the appellee's motion for fees. For the reasons set out below, the decision of the Bankruptcy Judge is AFFIRMED.

FACTUAL BACKGROUND

In July 1991, appellant Edgar L. Mathieu retained appellee Pennington and Haben, P.A. ("P & H")[1] to file a Chapter 11 bankruptcy petition on behalf of Mathieu and his wife, appellant Jane E. Mathieu, and one for the Mathieus' company, appellant Edgewater Sun Spot, Inc. Voluntary Chapter 11 petitions were filed on August 9, 1991, and the cases were ordered to be jointly administered.

Initially, Mark Hildreth, a P & H associate, was assigned to handle the appellants' cases. On September 30, 1991, Hildreth notified the appellants that he would soon be leaving P & H to return to Sarasota, Florida, and another P & H associate, D. Andrew Byrne, would assume responsibility for the litigation. However, Hildreth agreed to be available to assist Byrne and P & H with the bankruptcies.

A secured creditor and appellants' major adversary in the

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1. At the time this litigation was commenced, the firm's full name was Pennington, Wilkinson and Dunlap. In 1993, as a result of a merger, the name of the firm was changed to Pennington, Haben, Wilkinson, Culpepper, Dunlap, Dunbar, Richmond and French, P.A. For simplicity's sake, I have followed the Bankruptcy Judge's practice, and referred to the appellee as Pennington and Haben.

bankruptcy litigation was Bay Bank and Trust Co. ("Bay Bank"), located in Panama City, Florida. In March 1987, Bay Bank had extended the appellants two loans totalling $1.35 million. One of the loans, for $650,000.00, had been guaranteed by the Small Business Administration ("S.B.A."). For four years, the appellants timely made payments on the loans from Bay Bank. However, in 1991, appellants fell behind in their payments. At that time, Edgar Mathieu claimed, for the first time, that Bay Bank had deceived him into taking out a larger loan than he had wanted, and that he had not read the closing documents prior to signing them.

At a meeting on October 9-10, 1991, it was decided that Byrne would assume responsibility for bringing a lender liability action against Bay Bank, and Hildreth would be retained to handle the Chapter 11 administration. Hildreth indicated in a October 18, 1991, letter that he did not believe that the appellants had "any substantial affirmative claims against Bay Bank." However, Hildreth indicated that he felt that the appellants' could utilize the threat of an action against Bay Bank as leverage against the bank in the Chapter 11 proceeding.

In April 1992, P & H filed an interim application for fees and costs. The appellants did not oppose the motion. On July 27, 1992, the Bankruptcy Judge entered an order awarding the appellee interim fees of $19,500.00 and costs of $4,450.70. The bankruptcy case was lengthy and acrimonious, but eventually a settlement was reached with Bay Bank. The appellants Chapter 11 reorganization plans were confirmed on December 15, 1993.

In February 1994, the appellee filed a final application (labeled "supplemental application") for fees and costs. The appellee sought $62,470.50 in attorney's fees and $9,166.42 in

costs, as well as the $19,500.00 still unpaid from the first fee award. Attorney David L. Fleming entered a special appearance solely for the purpose of opposing P & H's fee application. However, Fleming did not file any written objections to the fee application until after the Bankruptcy Judge entered an order to compel. In response, P & H filed a second supplement to its fee application in which it reduced its requested fees and costs to a total of $52,415.06.

A hearing on the fee application was held before Bankruptcy Judge Lewis Killian on June 30, 1994. At the close of the hearing, Judge Killian reserved ruling for 30 days and allowed the parties to file written closing arguments and memoranda of law. The appellants timely filed a memorandum asserting that Byrne was not a disinterested party within the meaning of the Bankruptcy Code, and that P & H's fee application was inflated. On October 12, 1994, Judge Killian entered a lengthy written order, which granted to P & H the fees and costs requested in its second supplemental application.[2] The appellants timely filed a notice of appeal of this order.

STANDARD OF REVIEW

A district court reviewing the decision of its Bankruptcy Unit functions as an appellate court. *In re Sublett*, 895 F.2d 1381, 1383 (11th Cir. 1990). An award of attorney's fees is reviewed only for an abuse of discretion. *In re Holywell Corp.*, 967 F.2d 568, 571 (11th Cir. 1992). "An abuse of discretion occurs if the

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2. In his order, Judge Killian announced that pursuant to Rule 9011, Federal Rules of Bankruptcy Procedure, he would *sua sponte* consider imposing sanctions on the Mathieus and/or Fleming for their actions in objecting to the appellee's application for fees and costs.

judge fails to apply the proper legal standard or to follow proper procedures in making the determination." *In re Red Carpet Corp. of Panama City Beach*, 902 F.2d 883, 890 (11th Cir. 1990). Evidentiary rulings are also reviewed under an abuse of discretion standard. *Wu v. Thomas*, 996 F.2d 271, 275 (11th Cir. 1993); *Haygood v. Auto-Owners Insurance Co.*, 995 F.2d 1512, 1515 (11th Cir. 1993).

DISCUSSION

The appellants contend that the Bankruptcy Judge erred in finding that the appellee was a disinterested party under the terms of the Bankruptcy Code; that he erred in failing to order partial abstention; that he erred in awarding the appellee fees; and that he erred in certain evidentiary rulings during the hearing on the appellee's motion for fees.

1. *Disinterested Party.*

Title 11, United States Code, Section 327(a) permits the trustee, with approval of the court, to employ attorneys and other professionals. The appellee was employed pursuant to this statute. Section 328 of the same title contains limitations on the compensation of professionals employed under Section 327. It provides in pertinent part:

> Except as provided in section 327(c), 327(3), or 1107(b) of this title, the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under Section 327 or 1103 of this title, if at any time during such professional person's employment under

> section 327 or 1103 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed.

11 U.S.C. § 328(c). Section 328(c) is discretionary; it *permits* (but does not *require*) a court to deny compensation to professionals not found to be disinterested parties. *In re Prince*, 40 F.3d 356, 359 (11th Cir. 1994).

The appellants assert that the appellee's application for fees should have been denied completely, or at least reduced, because attorney Byrne was not a disinterested party within the meaning of the Bankruptcy Code. Whether an individual is a disinterested party is a finding of fact which should be reversed only if clearly erroneous. *In re Andura Corp.*, 39 F.3d 1191, 1994 WL 596777, *1 (10th Cir. 1994).

Initially, appellants assert that attorney Byrne was not disinterested because he was a member of the Small Business Administration's Regional Advisory Council ("S.B.A. Advisory Council") at the same time that John Christo, III, the president of Bay Bank, was also a member of the S.B.A. Advisory Council.[3] The parties dispute whether Byrne disclosed his membership on the S.B.A. Advisory Council to appellant Edgar Mathieu. The record reflects that the S.B.A. Advisory Council is composed of

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3. Although Byrne had recently been appointed to the S.B.A. Advisory Council, the Council had not met since his appointment, and Byrne had never attended a meeting as a member. Byrne once gave a speech to the S.B.A. Advisory Council prior to becoming a member. Byrne testified that Christo was not at the meeting in which Byrne spoke to the S.B.A. Advisory Council.

businessmen who advise the S.B.A. "about vital issues affecting small business." The S.B.A. Advisory Council represents potential borrowers and the community at large to the S.B.A.. Its role is purely advisory, and the Advisory Council has no input into the approval or management of loans.

The appellants assert in their brief that it "is common knowledge" that attorneys only join organizations like the S.B.A. "to make contacts." Appellants contend that Byrne's membership on the S.B.A. Advisory Council was a conflict of interest. The appellants claim that Byrne's recommendation that deposing S.B.A. officials was unnecessary and would be a waste of money was a ruse, motivated not by the interests of the appellants, but by Byrne's membership on the S.B.A. Advisory Council. However, Byrne testified at the hearing that Bay Bank had the authority to approve the loan without prior submission to the S.B.A., and that the S.B.A. had no knowledge of the circumstances of the loan or any documents which had not already been obtained from Bay Bank. Byrne testified that although Edgar Mathieu was convinced that there was a conspiracy by the S.B.A., its only role was to guarantee the loan, and that in his professional opinion, deposing S.B.A. officials would have been a waste of the assets of the bankruptcy estate.

The S.B.A. Advisory Council has no role in the approval or management of loans. Likewise, it is undisputed that the S.B.A. was only a contingent creditor, was not mentioned in the settlement agreement, and played no role in the administration of the case. Moreover, the role of the S.B.A. Advisory Council is to represent the interests of S.B.A. borrowers, such as the appellants. Under these facts, the Bankruptcy Judge found that Byrne's membership on the S.B.A. Advisory Council did not constitute a conflict of interest or render Byrne not a

disinterested party. There is ample record evidence to support that determination, and it is not clearly erroneous. The order regarding Byrne's membership on the S.B.A. Advisory Council is affirmed.

Appellants also assert that Byrne was not a disinterested party because members of his family held a financial interest in a Georgia bank. The record reflects that Byrne's wife is a minority stockholder and member of the board of directors of First National Bank of Grady County ("First National"), located in Cairo, Georgia. Byrne's father-in-law, John B. Wight, is controlling stockholder and chairman of the board of First National. Byrne has no personal interest in First National.

Charles Martin Stafford testified at the hearing on this matter held before the Bankruptcy Judge. Martin is president and vice chairman of the board of First National. Martin testified that First National does not have a correspondent bank relationship with Bay Bank, but that it does sometimes purchase loans from the Bay Bank. Martin became friends with both John Christo, III, and his father, John Christo, Jr., when all three men worked together as bank examiners.

Byrne did not disclose the fact that First national sometimes purchased loans from Bay Bank to the appellants or to the court. However, Byrne testified at the hearing that he did not know of the relationship between the banks, and even at the time of the hearing, he still had no knowledge of the relationship. Byrne testified that neither his wife nor his father-in-law ever discussed that matter with him. Martin testified that he considered the purchase of loans from Bay Bank to be "business strategy decisions" which he made, and that he did not discuss them with either Mrs. Byrne or her father.

Appendix B

The appellants do not explicitly contest the evidence that Byrne had no knowledge of First National's purchase of loans from Bay Bank. Appellant Edgar Mathieu even admitted that he had no evidence that Byrne knew of the relationship between the banks. Appellants merely assert that Martin's testimony is "disingenuous and totally lacks credibility." However, appellants have pointed to no evidence of record which contradicts Martin's testimony. I find no evidence that Byrne himself then knew that First National purchased loans from Bay Bank.

None of the loans which First National purchased from Bay Bank involved the appellants. In short, there is no evidence that First National or Byrne's family would be economically affected by the outcome of the appellants' litigation against Bay Bank. The Bankruptcy Judge's decision that Byrne remained a disinterested party is not clearly erroneous, and must be affirmed. *In re Prince*, 40 F.3d 356 (11th Cir. 1994); *In re Andura Corp.*, 39 F.3d 1191 (10th Cir. 1994).

2. ***Abstention.***

During the pendency of the bankruptcy proceedings, the appellants filed a legal malpractice action against Pennington & Haben in state court. The state court action is based on the appellee's prosecution of the lender liability claim against Bay Bank. Appellants filed a motion requesting that the Bankruptcy Court voluntarily abstain from deciding the appellee's motion for fees and costs since it involved their claims in the state court action. The Bankruptcy Judge denied the motion. Appellants assert that Judge Killian erred in refusing to order abstention.

Title 28, United States Code, Section 1334 authorizes a

federal court to abstain from hearing certain issues which arise during a bankruptcy action. It provides in pertinent part:

> **(c)(1)** Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

28 U.S.C. § 1134(c)(1).[4]

The appellants assert that the Bankruptcy Judge should have abstained from deciding the appellee's motion for fees for its services to the bankruptcy estate. The determination of fees of an agent of the estate is a core proceeding within the exclusive jurisdiction of the Bankruptcy Court. 11 U.S.C. § 157(b)(2)(A).

Appellants assert that the Bankruptcy Judge should have abstained because awarding attorney's fees to the appellee somehow prejudiced the appellant' state court action. Initially, I note that an action for malpractice against the trustee's attorneys cannot be commenced in state court without prior approval of the bankruptcy court, and the state court lacks jurisdiction to hear any case so filed. *In re DeLorean Motor Co.*, 991 F.2d 1236, 1241 (6th Cir. 1993); *In re Balboa Improvements, Ltd.*, 99 B.R. 966, 970 (9th Cir. BAP 1989). There is no indication

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4. Section 1334(c)(2) provides for abstention in regard to causes of action which could not have been commenced in federal court, absent bankruptcy jurisdiction. It is, of course, inapplicable to the appellee's motion for fees.

in the record that the appellants sought or received the approval of the Bankruptcy Court prior to filing the state court action.

Nevertheless, the appellants' abstention argument is without merit. At times, the appellants assert that the issue in the state malpractice action substantially overlaps the appellee's motion for fees and that the appellants will be denied a jury trial, among other advantages of a state forum, because the Bankruptcy Judge decided the appellee's motion for fees. At other places in its brief, the appellants assert that the state claim is distinct. The appellants cannot have it both ways. If it is distinct, then one claim is irrelevant to the other, and there is no reason for the Bankruptcy Court to abstain.

Even if the two claims do overlap, the record reflects no factors which favor abstention. Judge Killian was fully familiar with the services provided by the appellees. He conducted a full-day hearing on the matter. He was in a better position to evaluate the value of the appellee's services than a jury would be. He would have been in no better position to decide the motion for fees after the state court action was concluded. Moreover, it is not apparent from the record how appellants were prejudiced in their state court action. Finally, even if I accept the appellants' argument in full, a postpetition malpractice action against the bankruptcy trustee's attorneys is equitable in nature, and there is no right to a jury trial.

Although cited by neither party, *Billing v. Ravin, Greenberg & Zackin, P.A.*, 22 F.3d 1242, 1253 (3rd Cir. 1994), *cert. denied*, __ U.S. __, 115 S.Ct. 508, 139 L.Ed.2d 416 (1994) is directly on point. There, the debtors in possession objected to the bankruptcy counsel's application for fees on the grounds that the fees were inflated and that the attorney's services had been below

the standard of care. 22 F.3d at 1242. The debtors commenced a malpractice action against the bankruptcy counsel in the District Court. The Third Circuit held that this was an equitable claim, and that the debtors had no right to a jury trial:

> We hold that an allegation of legal malpractice raised as a defense to post-petition fees for bankruptcy counsel likewise falls within the process of the allowance and disallowance of claims. The debtors have no Seventh Amendment right to a trial by jury, not because of specific waiver of Seventh Amendment rights, but because their claim has been converted from a legal one into an equitable dispute over a share of the estate.

22 F.3d at 1253.

There was no error in the Bankruptcy Judge's decision regarding abstention.

3. *Basis for the Fee Award to the Appellee.*

Devoting only one paragraph of its brief to the issue, the appellants argue that the Bankruptcy Judge failed to articulate a sufficient basis for the award of fees to the appellee. The appellee filed detailed fee applications, reporting the time expended by each individual in one-tenth of an hour increments. The appellee's hourly charge for the attorneys' services ranged from $100.00 to $150.00. The Bankruptcy Judge had evidentiary materials supporting the appellee's fee request. He determined that the appellee should be awarded fees as requested. The trial judge who observed the attorneys' performance is in a superior

position to evaluate the value of their services, and his decision should be reversed only for an abuse of discretion. *In re Holywell Corp.*, 967 F.2d 568, 571 (11th Cir. 1992). There was no abuse of discretion.

4. *Evidentiary Rulings.*

Finally, appellants assert that the Bankruptcy Judge made four errors in his evidentiary rulings. First, the appellants contend that Judge Killian erred in excluding the expert testimony of Gordon P. Serou, Jr. The trial court "has broad discretion in determining whether to admit or exclude expert testimony, and its decision will be disturbed on appeal only if it is manifestly erroneous." *Evan v. Mathis Funeral Home, Inc.*, 996 F.2d 266, 268 (11th Cir. 1993) (citing *Salem v. United States Lines Co.*, 370 U.S. 31, 34, 82 S.Ct. 1119, 1122, 8 L.Ed.2d 313 (1962)).

At the hearing on this matter, the appellants attempted to call Gordon P. Serou, Jr., an attorney, as an expert witness. The appellee's attorney indicated that he had never heard of the witness. While objecting to the label "surprise witness," the appellants' attorney conceded that, while he had discussed the other witnesses with opposing counsel, he had not disclosed Serou. Judge Killian then excluded Serou.

Appellants correctly note that the witness disclosure provisions of Rule 26, Federal Rules of Civil Procedure, do not apply in Bankruptcy Court. *See* Rule 81(a)(1), Fed.R.Civ.P. However, Local Bankruptcy Rule 507(F) requires a party intending to introduce expert testimony to make the expert available for deposition. Implicit in that rule is a requirement to reveal the existence of the expert. A party cannot depose a

witness whose identity has not been revealed. Judge Killian was well within his discretion when he excluded the testimony of an undisclosed expert witness.

Second, the appellants assert that the Bankruptcy Judge erred in refusing to admit into evidence Defendant's Exhibits 9 and 10. Exhibit 9 is eight pages in length and is entitled, "28: Lost Profits." It purports to have been authored by two certified public accountants and appears to be a chapter from some type of handbook or reference work. Exhibit 10 is a photocopy of a three page article entitle Litigation Support Services. It purports to be "MAS Notes" in the September 1991 issue of *Florida CPA Today*, and to have been written by Michael A. Crain, C.P.A. Both appear to be inadmissible hearsay, and there is no evidence in the records that these documents were relied upon by the accountants who testified at the trial, or were within Rule 803(18) of the Federal Rules of Evidence. Moreover, I have carefully read both documents. Both have little or no relevance to the issue of the appellee's motion for fees. Judge Killian did not abuse his discretion in declining to admit appellants' exhibits 9 and 10 into evidence.

The last two evidentiary errors raised involved Byrne's testimony. Appellants assert that the Bankruptcy Judge erred in allowing Byrne to testify that he had been involved in representing two other debtors in Chapter 11 actions. Appellants contend that their post-trial investigation revealed that Byrne's testimony was misleading (apparently because he was not the attorney of record in those cases). Appellants also assert that Judge Killian erred in relying upon 13 pages of Byrne's handwritten notes to support one time entry, arguing that although Byrne authenticated the notes at the hearing, they were "a falsification." These objections go to the weight of the

evidence, but not the admissibility. There was no error in admitting either into evidence.

Even if I assume that admission of this testimony constitutes error, it was harmless. The characterization given to Byrne's role in the earlier cases is of little or no relevance to the value of the appellee's services in this case. Similarly, there was ample evidence in the record as to the nature and value of the appellee's services.

CONCLUSION

The decision appealed from is AFFIRMED in all respects.

DONE AND ORDERED this 23rd day of June 1995.

s/ Roger Vinson
ROGER VINSON
United States District Judge

Appendix B

JUDGMENT IN A CIVIL CASE

United States District Court
Northern District of Florida

Case Title:

IN RE: EDGEWATER SUN SPOT, INC.,
AND EDGAR L. & JANE E. MATHIEU

Docket Number

94-50370-RV

Name of Judge or Magistrate Judge

ROGER VINSON

* * *

☒ **Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate judge) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Pursuant to and at the direction of the Court, the decision of the Bankruptcy Judge is AFFIRMED in all respects per Order entered this date.

Appendix B

ROBERT A. MOSSING, CLERK June 23, 1995

(By) Deputy Clerk
s/ L. James

ENTERED ON DOCKET June 23, 1995 BY lj
(Rules 58 & 79(a) FRCP or 32(b)(1) & 55 FRCRP)

Copies mailed to: Fleming, Rude, Glidewell, COB 1995

APPENDIX C — ORDER OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF FLORIDA, PANAMA CITY DIVISION FILED OCTOBER 12, 1994

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

Chapter 11
No. 91-02304

IN RE:

EDGEWATER SUN SPOT, INC.

Debtor(s).

Jointly Administered
No. 91-02303

EDGAR L. & JANE E. MATHIEU,

Debtor(s)

ORDER AWARDING ATTORNEYS' FEES

THIS MATTER having come on for hearing on the Supplemental Application of Pennington & Haben, P.A. for attorneys' fees and costs and on the objection filed by the debtors thereto, and the court having considered the evidence presented at hearing and the Memoranda of Law and arguments of counsel, and having entered its Memorandum of Opinion of even date herewith setting forth findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052, it is hereby

Appendix C

ORDERED AND ADJUDGED that:

1) The Supplemental Application for Attorneys' Fees and Costs of Pennington & Haben, P.A. be and same is hereby granted and the objection of the debtors is hereby overruled.

2) Pennington & Haben, P.A. is hereby awarded attorneys' fee in the amount of $43,805.00 for the period of March 16, 1992 through January 31, 1994 together with costs in the amount of $8,610.06 plus the balance from the early applications of $17,500.00 from Edgewater Sun Spot and $2,000.00 from the Mathieus for a total award of $71,915.06.

3) Pursuant to Bankruptcy Rule 9011, notice is hereby given that the court will consider imposition of sanctions on debtors' counsel, David Fleming, Esq., the debtors, or all of them jointly and severally in connection with the hearing on the supplemental application filed by Pennington & Haben, P.A. at the hearing on the instant application.

DONE AND ORDERED at Tallahassee, Florida this 12th day of October, 1994.

s/ Lewis M. Killian, Jr.

LEWIS M. KILLIAN, JR.
U.S. Bankruptcy Judge

APPENDIX D — MEMORANDUM OPINION OF THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF FLORIDA, PANAMA CITY DIVISION FILED OCTOBER 12, 1994

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PANAMA CITY DIVISION

Chapter 11
No. 91-02304

IN RE:

EDGEWATER SUN SPOT, INC.

Debtor(s).

Jointly Administered
No. 91-02303

EDGAR L. & JANE E. MATHIEU,

Debtor(s)

MEMORANDUM OF OPINION

THIS CAUSE is before the Court for consideration of Pennington and Haben, P.A.'s fee application and the Debtors' objection to the fee application. The Court having heard argument of counsel, and having reviewed the pleadings and other documents in the file, finds that Pennington and Haben, P.A. is entitled to the full amount of compensation requested in the fee application, as supplemented.

Appendix D

In early July 1991, Edgar L. Mathieu ("Mathieu") retained Pennington and Haben, P.A. ("P & H")[1] to file Chapter 11 petitions on behalf of Mathieu and his wife, and for Edgewater Sun Spot, Inc. ("ESS"), Mathieu's company (collectively referred to herein as the "Debtors"). Mark Hildreth ("Hildreth"), a P & H associate, was assigned to handle Debtors' cases. The voluntary Chapter 11 petitions were filed on August 9, 1991, and the cases were ordered to by jointly administered. Shortly thereafter, Hildreth notified the Debtors by letter dated September 30, 1991, that he was leaving Tallahassee and P & H to join the firm of Abel, Band, Russell, Collier, Pitchford & Gordon in Sarasota, Florida. Hildreth stated that he would be available to assist P & H with the plan and other administrative details of the Debtors' Chapter 11 cases.

D. Andrew Byrne ("Byrne"), joined P & H in August of 1991. Upon Hildreth's departure, Byrne assumed full responsibility for representation of the Debtors. However, in a meeting with the Debtors on October 9th and 10th of 1991, it was decided to bring Hildreth back in to handle the Chapter 11 administration and Byrne would concentrate on a lender liability claim against Bay Bank and Trust ("Bay Bank"), the major adversary of the Debtors.

The lender liability claim was based upon commercial loans that the Debtors obtained from Bay Bank in March of 1987. The Debtors already had a Small Business Administration (SBA) loan in the amount of approximately $400,000. Debtors wanted

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1. At the time of the retention, the firm was known as Pennington, Wilkinson and Dunlap. Due to a merger in 1993, the name of the firm was changed to Pennington, Haben, Wilkinson, Culpepper, Dunlap, Dunbar, Richmond and French, P.A. For purposes of this application, the firm will be referred to as Pennington and Haben (P & H).

to finance the acquisition of a new store with a new loan from Bay Bank of $600,000. According to the Debtors, instead of following their instructions, Bay Bank allegedly issued two new loans in the amount of $1.35 million[2], and extinguished the existing SBA loan in the process. The loan documents were signed by the Debtors in March of 1987. Mathieu alleges that he was pressured by Bay Bank officials into signing these documents and never even read the loan agreements at the closing. Mathieu further alleges that he had no intentions of terminating the existing SBA loan in this manner or of incurring such a significant debt load.

Notwithstanding the circumstances behind the loans, Mathieu made payments without protest for over four years and remained current on the loans through the time he decided to file Chapter 11. It was only when he began having difficulty meeting the debt service and meeting all of his other obligations that he sought legal counsel to attempt to obtain relief against the bank.

From the very beginning of the relationship between Mathieu and P & H, the case strategy was to use the Chapter 11 to obtain discovery from the bank and to use the lender liability claim as leverage in order to obtain the bank's consent to a favorable reorganization plan. While Hildreth disputed this position at the hearing on P & H's fee application, his October 18, 1991 letter to Byrne reads differently. In that letter Hildreth clearly stated that he did not believe that the Debtors had "any substantial affirmative claims against Bay Bank" and that "{i}n my opinion, however, the facts which we are aware of could

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2. One loan issued by Bay Bank and Trust was SBA guaranteed in the amount of $650,000. The second loan for $700,000 was issued by Bay Savings Bank.

probably be used more to benefit a settlement of the Chapter 11 case on terms favorable to our clients as opposed to any type of affirmative action against the bank in the future." Hildreth's letter noted that it would be most efficient if he limited his involvement to preparation and drafting of the major bankruptcy documents like the Plan and the Disclosure Statement. Byrne confirmed with Hildreth by letter dated January 2, 1992, that Hildreth would work on the plan negotiations and strategy and that P & H would concentrate on the Debtors' lender liability claim against Bay Bank.

The relationship between the Debtors and Bay Bank had rapidly declined after the filing of the petition. In November of 1991, Bay Bank moved for relief from the stay or for adequate protection, although the hearing was repeatedly postponed and was never held. In December 1991, Debtors filed their first Joint Plan of Reorganization, to which Bay Bank promptly filed an objection. On April 1, 1992, the Debtors filed an adversary proceeding against Bay Bank, objecting to the secured claim and asking for a determination of the validity and extent of the liens and seeking affirmative relief under various lender liability theories. In late June of 1992, Debtors filed a Disclosure Statement and the first Amended Plan. Negotiations between the parties continued and a settlement was proposed by Hildreth in July of 1992, without success. The second Amended Plan was filed in late August 1992. The third Amended Plan was filed in March 1993.

Discovery was being conducted by P & H throughout this period on the adversary proceeding issues. The adversary proceeding complaint alleged a breach of fiduciary duty, fraud and negligent misrepresentation, breach of contract and misapplication of loan proceeds, negligent mishandling of

loans, and a violation of 12 U.S.C. § 1972 (anti-tying). The adversary proceeding was vigorously litigated by the parties. Numerous motions were filed and much discovery was conducted. One witness attempted to avoid service of the subpoena and even refused to answer questions at a deposition. Another witness's deposition was the subject of a motion to compel by Bay Bank. A hearing was held in June of 1993 on summary judgment motions by both sides. After that hearing, at the suggestion of the parties, the court entered an Order Requiring Mediation. Hildreth continued to negotiate a settlement and made a written confirmation of a proposal by letter dated September 20, 1993. This proposal was not accepted.

In November of 1993, the parties met for mediation. At the opening of the mediation, Bay Bank made a settlement proposal that was very similar to the terms Hildreth had negotiated earlier. Mathieu went to lunch with the mediator[3], at the request of Hildreth or Byrne, to allow Mathieu a chance to relate his side of the case without others present. Throughout the day there was not much movement although Bay Bank did grant a few small concessions, but Mathieu refused to settle without receiving cash in hand from Bay Bank in addition to any other terms. Mathieu testified that Byrne became irate when the Debtors refused to accept a settlement offer. Mathieu said that Byrne demanded immediate payment of $50,000 or else he quit. Both Byrne and the mediator deny that Byrne made such a statement. Byrne had attempted to explain to Mathieu that the settlement was the best alternative, because prosecuting the lender liability claims would require a tremendous expenditure of both time and legal fees. Mathieu became irate at the idea of having to pay still

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3. The mediator was Arden Siegendorf, a retired state Circuit judge, who has handled approximately 1,800 mediations.

more attorney fees. Because Mathieu was so emotional about the case, the mediator called an adjournment to allow Mathieu to cool off and think rationally about his financial situation.

After the adjournment was called, Hildreth suggested to Byrne that he not contact the Debtors but that Hildreth attempt to use the rapport he had established with them to convince them that the settlement was in their best interests. Hildreth did visit the Debtors at their home and they agreed to accept a settlement on terms negotiated at the mediation. The settlement included terms that led to the confirmation of the debtors' Chapter 11 plan on December 15, 1993. Mathieu ordered Hildreth not to communicate further with Byrne, which resulted in Byrne not even knowing that a plan had been confirmed and the adversary proceeding settled. Shortly after the mediation, Mathieu hired a private investigator to investigate Byrne. That investigation apparently produced some, if not all of the information upon which Mathieu seeks to deny all compensation to P & H.

In April of 1992, P & H filed an interim fee application for services provided to the Debtors between August 9, 1991 and March 15, 1992 in the amount of $35,000 attorney fees for ESS and $4,000 attorney fees for the Mathieus. P & H sought reimbursement for expenses in the amount of $3,982.59 for ESS and $468.11 for the Mathieus. This application included voluntary reductions for travel time and for possible duplication of efforts with Hildreth totaling over $6,000. Mathieu voiced no objection to this fee application. In an Order dated July 27, 1992, this Court authorized payment of $17,500 attorney fees for ESS, $2,000 attorney fees for the Mathieus, $3,982.59 in costs for ESS, and $468.11 in costs for the Mathieus. The remainder of the fees was to be determined at the conclusion of the case.

Appendix D

P & H filed a supplement to the fee application (actually a final application) in February 1994. This application covered the period from March 16, 1992, through January 31, 1994, and sought $62,470.50 in fees and $9,166.42 in costs, in addition to asking for payment of the remaining $19,500 from the first fee application. The amount requested in this application was $81,970.50 in fees, and $9,166.42 in costs, for a grand total requested of $91,136.92.

David L. Fleming, Esq., ("Fleming") filed a notice of special appearance for the Debtors in April 1994, appearing solely to work on opposition to the fee application of P & H. At the same time, Fleming filed a motion to continue the hearing on P & H's fee application to give him time for discovery and to prepare and present the Debtors' opposition to the application. The Debtors failed to file a formal objection to the fee application until after this Court entered an order granting P & H's Motion to Compel the filing Debtors' written objections. When filed, Debtors' objection alleged that P & H failed to disclose several conflicts of interest and that P & H engaged in improper billing, failed to exercise due diligence in prosecuting Debtors' lender liability claims against a creditor, and attorney misconduct at a mediation.

A hearing on the fee application and the objections was held June 30, 1994. At this hearing, P & H filed a second supplement to its fee application. This supplement included voluntary reductions for the period covered by the application under consideration here and also asked for fees and costs incurred during the defense of the fee application. For the purposes of this opinion, the only aspects of this second supplement that will be considered are the voluntary reductions for the period covered by the first supplement (March 16, 1992, through January 31,

1994). The voluntary reductions for this period total more than $19,000. As requested in this second supplement, the amount of fees and costs sought for this period totals $52,415.06.

The Court reserved ruling on the matter and granted the parties thirty days to file written closing arguments and memoranda of law. In August 1994, Debtors filed a memorandum regarding P & H's qualifications to receive compensation. This memorandum asserted that compensation was either barred or should be reduced pursuant to 11 U.S.C. § 328(c)[4] for P & H's failure to comply with the requirements of 11 U.S.C. § 327(a)[5]. P & H timely filed its memorandum in support of its supplemental fee application.

In Debtors' Memorandum Regarding Qualification of Pennington & Haben, P.A. for Compensation Under Sections

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4. In pertinent part, 11 U.S.C. 328(c) provides:

> "the court may deny allowance of compensation for services and reimbursement of expenses of a professional person employed under section 327 or 1003 of this title, if at any time during such professional person's employment under section 327 or 1003 of this title, such professional person is not a disinterested person, or represents or holds an interest adverse to the interest of the estate with respect to the matter on which such professional person is employed."

5. Section 327(a) allows the court to authorize the employment of "attorneys, accountant, appraisers, auctioneers, or other professional persons, that do not hold or represent an adverse interest to the estate, and that are disinterested persons. . . ."

327(a) and 238(c) of the Bankruptcy Code, the Debtors argued that P & H is not a "disinterested person" within the meaning of 11 U.S.C. § 327(a) and should therefore be barred from receiving compensation pursuant to the provisions of 11 U.S.C. § 328(c). Section 327(a) of the Bankruptcy Code has two requirements: (1) that the attorney for the Debtor be a "disinterested person," and (2) that the attorney for the Debtor may not hold or represent an adverse interest to the estate. "Disinterested person" is a term defined by the Code as a person that:

> (A) is not a creditor, an equity security holder, or an insider;
>
> (B) is not and was not an investment banker for any outstanding security of the debtor;
>
> (C) has not been, within three years before the date of filing of the petition, an investment banker for a security of the debtor, or an attorney for such an investment banker in connection with the offer, sale, or issuance of a security of the debtor;
>
> (D) is not and was not, within two years before the date of the filing of the petition, a director, officer, or employee of the debtor or of an investment banker specified in subparagraph (B) or (C) of this paragraph; and
>
> (E) does not have an interest materially adverse to the interest of the estate or of any class of creditor or equity security holders, by

> reason of any direct or indirect relationship to, connection with, or interest in, the debtor or an investment banker specified in subparagraph (B) or (C) of this paragraph, or for any other reason;

11 U.S.C. § 101(14).

The provision of § 327(a) that an attorney may not hold an interest adverse to the estate has been held to be essentially synonymous with the requirements of § 101(14)(E). *In re Adam Furniture Industries, Inc.*, 158 B.R. 291 (Bkrtcy.S.D.Ga. 1993). The requirement of § 327(a) that an attorney may not have represented an interest adverse to the estate is in addition to the requirements of § 101(14). *Id.* at 296. The term "adverse interest" is not defined by the Code, but by case law. Adverse interest has been defined as "possessing or asserting any economic interest that would tend to lessen the value of the estate or create either an actual or potential dispute in which the estate is a rival claimant." *In re The Red Lion, Inc.*, 166 B.R. 296, 298 (Bkrtcy.S.D.Tex. 1994).

The first conflict of interest asserted in Debtors' objection was that Byrne was a member of the SBA Regional Advisory Council ("the Council") and Byrne failed to disclose this membership to the Debtors and the Court. The Debtors make two arguments in support of this assertion. First, the Debtors argue that since the loans that were the subject of the adversary proceeding against Bay Bank were guaranteed by the SBA, Byrne was required to have disclosed his involvement with the Council. Byrne's only active involvement with the Council was before he was even asked to become a member. In October of 1992, Byrne had given a presentation at a Council meeting in

Jacksonville, Florida. The members of the Council and Mr. Tom Short, the SBA District Director, were so impressed with Byrne's presentation that Mr. Short invited Byrne to join the Council. Byrne did accept an appointment to the Council. However, since the time that Byrne was invited to join, the Council has not held a meeting and Byrne has had virtually no contact with the Council.

The Council is a group of businessmen from the region that serves as a liaison between the SBA and the business community to advise the SBA on how it can better serve the business community. The Council does not make policies and procedures of the SBA, nor does it have any involvement whatsoever with the SBA loan process. Despite Mathieu's assertions to the contrary, Byrne testified that he had indeed advised Mathieu on numerous occasions of his involvement with the Council.

Debtors argue that Byrne's failure to conduct discovery of the SBA, despite repeated requests by the Debtors to do so, proves that Byrne was putting the interests of the SBA ahead of the Debtors' interests. Byrne testified that he believed that he had all of the relevant loan documents and that it would have been unnecessary to conduct time-consuming (and therefore expensive) discovery of the SBA. Bryne explained that Bay Bank was an SBA approved lender that had the power to write SBA loans without sending all of the paperwork throughout he usual SBA channels, thus no additional loan documentation would have been held by the SBA. I find Byrne's explanation reasonable under the circumstances. Accordingly, I find this allegation to be entirely without merit under the instant facts. The SBA Regional Advisory Council possesses no cognizable interest adverse to the Debtors' estate. Byrne's membership in the Council is not even a potential conflict that mandated

disclosure and certainly does not demonstrate an adverse interest that requires action by this Court.

The second conflict asserted is the alleged affiliation between Byrne and the First National Bank of Grady County, Georgia ("FNB Grady"). Byrne's own wife owns stock in and serves on the board of the FNB Grady holding company. Neither Byrne nor his wife actively participate in the affairs of the bank nor do they have any knowledge of the bank's business dealings. Debtors' argument that FNB Grady has "unusually close ties" to Bay Bank is completely irrelevant under the instant facts. The evidence presented shows that the only ties between FNB Grady and Bay Bank are that FNB Grady routinely purchased loans from Bay Bank. The unrefuted testimony of Charles Stafford, CEO of FNB Grady, established that neither Byrne nor his wife would have had any reason to know of the relationship between FNB Grady and Bay Bank. Byrne's testimony was that they had no knowledge of the relationship and Mathieu acknowledged that he had no knowledge of any facts to the contrary.

Notwithstanding the commercial relationship between Bay Bank and FNB Grady, the relationship between Byrne and FNB Grady is tenuous at best. Even had Byrne known of the relationship, there still would be no conflict given the nature of the relationship between the two banks. FNB Grady merely purchased loans from Bay Bank after a thorough review of each loan according to its lending policies. The financial affairs of Bay Bank had absolutely no bearing on the soundness of the loans purchased by FNB Grady, which looked solely to the makers thereof for payment. Under the relevant law and facts, these relatively insignificant connections do not create any interest adverse to the Debtor's estate that warrants disqualification.

Appendix D

The third conflict of interest asserted in Debtors' objection was that John Christo, a member of the family that controls Bay Bank, was the best man in the wedding of the sister-in-law of a P & H associate that also worked on Debtors' adversary proceeding. This allegation was abandoned by the Debtors at the hearing, and deservedly so.

The cases cited by Fleming in support of the alleged conflicts of interest are inapposite to the instant facts. None of Debtors' allegations establish that P & H was not a disinterested person within the meaning of § 101(14) of the Code. At best, the conflicts existed only in Mathieu's overactive imagination and at worst, they are merely a desperate attempt to avoid paying the fees earned by P & H. The lengths to which Mathieu went to dig up dirt on Byrne strongly suggest the latter. I find these alleged conflicts to be frivolous and not properly grounded on applicable law.

The Debtors alleged six grounds for why the fee application should be reduced: the number of hours charged was excessive in light of the results obtained, the hourly rates charged were excessive, expenses were inappropriate or not recoverable, unwarranted duplication of efforts, the failure to exercise due diligence in prosecuting Debtors' claims against Bay Bank, and inappropriate conduct by Byrne at the mediation that forced the Debtors to accept an allegedly unfavorable settlement.

The first three grounds asserted for a reduction in fees are not supported by any evidence or argument before the Court. At no time during the course of this case had the Debtors voiced any objection to this Court or to P & H about the hourly rates or the number of hours charged by P & H.

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Debtors allege that excessive hours were billed for the October 9th and 10th, 1991 meeting between Byrne and the Debtors. Mathieu says that he sat in Byrne's office for most of two days, being completely ignored. At the hearing Debtor asserted that it was ridiculous for Byrne to charge him for nine hours when Byrne had only given not more than hour's worth of time to him. However, Mathieu almost immediately contradicts himself when he says "{f}rom 1:00, 1:30 to 4:00, 4:30 in the afternoon, we never talked to him for five minutes without being interrupted." Byrne's production of time records and thirteen legal pages of handwritten notes on the Debtors' loans and financial situation taken at those meetings is concrete evidence that refutes Mathieu's often contradictory testimony. The Court also notes that this meeting occurred during the time period covered by P & H's initial fee application, which was never objected to by the Debtors.

Debtors presented no evidence as to why the hourly rates charged were excessive. The testimony presented by the Debtors in support of the excessive hours allegation is not credible in light of the evidence produced by P & H. Accordingly, I conclude that both the amount of hours charged and the hourly rates are reasonable and appropriate, in light of the voluntary reductions included[6].

Debtors' assertion that P & H agreed not to charge for travel and expenses, pursuant to "firm policy", is without merit. The engagement letter makes no mention of such an unusual

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6. This Court has a policy of only allowing 50% of normal hourly rates to be charged for travel time, unless that travel time is proven to be productive and beneficial to the client. The application includes voluntary reductions to account for this policy.

arrangement and this Court will not imply such a provision solely on the basis of Mathieu's testimony. Expenses that may be properly charged to a debtor's estate are expenses that can be clearly attributed to a particular client's account. *In re Island Helicopter Corp*, 53 B.R. 71 (Bkrtcy.E.D.N.Y. 1985). "Examples include court fees, transcription fees, out of town travel expenses, delivery service, long distance telephone calls and postage expenses." *Id.* at 73. Travel expenses are customarily charged to the client and it is highly unlikely that an established law firm would absorb such charges in this particular type of action. The expenses and costs claimed are both appropriate and reasonable.

The Debtors failed to present evidence of P & H's duplication of efforts with Hildreth. The fee application, as supplemented, already included voluntary reductions of over $25,000 for possible duplication of efforts of P & H with those of Hildreth. I find these reductions sufficient to offset any unwarranted duplication of efforts.

The alleged failure to use due diligence in prosecuting the lender liability claims against Bay Bank is based upon the Debtors' dissatisfaction with the end result of this case. The Debtors never accepted the fact that the lender liability claims had serious problems with the applicable statute of limitations, with proof of the anti-tying claims, and with the amount of damages. The Debtors refused to agree with Byrne and Hildreth's assessment that, while the lender liability claims may have had some merit, it was economically unfeasible to litigate those claims. Both attorneys told the Debtors that the litigation expenses could far outweigh any possible recovery. Mathieu was convinced that he had a million dollar case and refused to accept the conclusion of his attorneys. As Byrne so aptly testified about

Mathieu at the hearing, "he wanted his pound of flesh and he was not going to consider any settlement."

Debtors' disappointment with the results of the litigation is unwarranted considering the dire financial predicament they were in. In fact, the strategic decision by Debtors' counsel to use the lender liability claims against Bay Bank as leverage to settle the Chapter 11 cases proved to be a very successful tactic that led to a confirmed Chapter 11 plan. The Debtors' dissatisfaction with the results achieved in the litigation hardly mandates a finding of the lack of due diligence by an attorney[7].

Debtors' final allegation of misconduct involves Byrne's actions at the mediation in November of 1993. The Debtors claim that Byrne's "resignation" forced them to accept an unfavorable settlement. Any competent attorney knows that withdrawing from representation is not quite so simple as saying, "I quit." No request for withdrawal was made to this Court until after the Debtors objected to P & H's fee application. Byrne is an experienced attorney, and his testimony clearly shows that he had no intention of abandoning the Debtors[8]. Byrne had attempted to explain to his client that the successful prosecution of lender liability claims is extremely difficult and would require a significant (and justified) expenditure of attorney fees. Byrne tried to explain that the expense of litigating the adversary

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7. The fact that P & H took no less than 22 depositions in attempting to prosecute the lender liability claims adds even more support to this Court's conclusion.

8. Byrne is supported by Arden Siegendorf, the mediator, who testified that he had no recollection of Bryne making any such statements at the mediation.

proceeding against Bay Bank would be tremendous, and that he and his firm would be rightfully entitled to compensation for their efforts.

Mathieu's claim that he was forced to accept an unfavorable settlement flies in the face of the fact that Hildreth had proposed very similar terms for settlement just a few months earlier. The end result of the settlement was actually quite favorable to the debtors. Bay Bank took back a gasoline contaminated property for the full appraised value and applied that value to the outstanding balance of Debtors' obligations. Bay Bank refinanced the remaining balance outstanding on Debtors' loans at a more favorable interest rate, agreed to release Debtors' personal residence and a liquor license upon repayment of $50,000 principal[9], and agreed to release Debtors from all civil liability and clean up costs for the gasoline contaminated property. Hildreth testified at the hearing that he felt that a piecemeal settlement would have been possible, resolving the Chapter 11 plan but leaving the lender liability claims open. The testimony of Lofton J. Westmoreland, counsel for Bay Bank, and common sense belies that notion. It is ludicrous to believe that a banking institution would agree to take back a contaminated property at full market value, renegotiate a commercial loan, absolve a borrower of liability for civil judgments and clean up costs of a contaminated property, while leaving itself exposed to a potentially substantial lender liability judgement. Mathieu was hardly the hapless victim of a "bum deal" as he attempts to portray himself to this Court.

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9. Shortly after confirmation, the Debtors sold the liquor license for $100,000 resulting in a net of $50,000 with which they made payment to professionals other than P & H.

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Mathieu's pauper argument that Byrne's conduct at the mediation left him in a position where he was forced to accept an unfavorable settlement because he had no money to hire additional counsel flies in the face of the fact that Mathieu paid $5,000 to retain Fleming and agreed to pay Fleming a minimum fee of $10,000, or 20% of any savings on P & H's fee application[10]. The evidence presented shows that Fleming was involved tangentially in this case for approximately a year before making any formal appearance. It was Fleming who suggested to Hildreth that the adversary complaint be amended to add an anti-tying count, and it is Fleming who insists that Mathieu's claim was worth several million dollars. If Fleming was so impressed by the viability of the lender liability claims, it seems logical that he would have made himself available to prosecute these valuable claims on a contingency basis, not merely to protest a fee application.

Two other arguments made by the Debtors are equally unpersuasive. They first argue that Byrne was not diligent in the prosecution of the lender liability claim because he failed to retain an expert, such as an economist, to analyze and present a computation of damages. If this had been a situation in which trial of the action was the goal and the plaintiff had the financial ability to fund the litigation, the retention of an expensive consultant may have been warranted. However, in the context of a financially distressed chapter 11 debtor in need of a successful reorganization which was dependent on a timely resolution of the claim against the bank, the expense of such an expert could not be justified.

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10. This Court also notes that the Debtors paid Hildreth $50,000, an accountant $20,000 (without this Court's approval), and also $5,000 to an environmental law firm for services in connection with the contaminated property, all within just a few months after this mediation.

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The Debtor's argument that Byrne did not have the background in bankruptcy reorganizations that he represented when he initially took responsibility for the cases completely ignores the fact that within weeks of Hildreth's departure, he was back in the cases handling the bankruptcy aspects of the cases. Byrne's responsibilities were limited to the handling of the action against the bank.

The evidence presented in this matter completely fails to support any of the Debtors' objections to the fees requested by P & H. If the Debtors were so dissatisfied with the services provided, they could have, at any time, terminated the firm and sought other counsel, either Hildreth of Fleming, perhaps. Instead, they waited until P & H had invested over two years in the litigation of the case, and then hired a private investigator in an effort to find an excuse to deny all fees to P & H when it became obvious that Byrne and the firm would not completely finance Mathieu's quest for his "pound of flesh" from the bank. The result achieved in putting the Debtors in a position to successfully reorganize justifies an award of the fees requested.

Accordingly, I find that P & H is entitled to an award of fees in the amount of $43,805.00 for the period of March 16, 1992 through January 31, 1994, together with costs in the amount of $8,610.06 plus the balance from the earlier applications of $17,500 from ESS and $2,000 from the Mathieus for a total award of $71,915.06.

Currently pending before the court, but not yet heard, is the supplemental application filed by P & H for fees incurred in connection with litigating the objection dealt with herein. Given the findings set forth in this opinion, I am compelled to consider, ***sua sponte***, pursuant to the requirements of Rule 9011, Federal

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Rules of Bankruptcy Procedure the imposition of sanctions on Mr. Fleming, the Mathieus, or all of them. Accordingly, pursuant to the requirements of B.R. 9011, notice is hereby given that the court will, in conjunction with any hearing of P & H's supplemental application for fees, consider the imposition of sanctions, as may be appropriate, on David Fleming, Esq., Edgar and Jane Mathieu or all, jointly and severally.

This opinion constitutes the court's findings of fact and conclusions of law in accordance with Bankruptcy Rule 7052. A separate order will be entered in accordance herewith.

DATED this 12th day of October, 1994.

s/ Lewis M. Killian, Jr.
LEWIS M. KILLIAN, JR.
U.S. Bankruptcy Judge